IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 639.

PETER B. SCHYMAN,

Petitioner,

vs.

THE DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS, AN ADMINISTRATIVE AGENCY, AND C. HOBART ENGLE, CHAS. F. KERVIN, H. KENNETH SCATLIFF, OSCAR HAWKINSON, JAMES H. HUTTON, EVERETT P. COLEMAN, WALTER STEVENSON, JACOB L. SCHEER AND MARJORIE TAYLOR,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Peter B. Schyman, petitioner, prays that this Court grant rehearing of its order of February 25, 1957, denying the petition for a writ of certiorari, wherein the revocation of petitioner's medical license had been sustained by the Illinois courts, and that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, and, to the extent that the order of the Supreme

Court of Illinois denying petitioner leave to appeal may constitute a final judgment rendered by the highest court of the State in which a decision could be had, to review the order of that Court.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Presumably petitioner failed clearly to demonstrate that there were special and important reasons for review. This may have been the result of petitioner's neglect to argue certain enumerated questions (Pet'n for Cert., pp. 4 and 5) and his consequent failure to persuade the Court that a substantial federal question was controlling.

In case this honorable Court had the impression that the decision of the State court review of which is herein sought would be in conflict with the applicable decision of this Court, *Barsky* v. *Board of Regents*, 347 U. S. 442, in the event that the State court decision could not be sustained on non-Federal grounds, or that petitioner's claims that he was denied due process and equal protection of the law presented no more than simple evidentiary questions, petitioner respectfully requests rehearing of his petition for certiorari confined to the question of whether or not the decision below can be sustained on other than Constitutional grounds.[1]

The Illinois Supreme Court, without opinion, transferred to the Illinois Appellate Court petitioner's direct appeal on constitutional grounds, because the "case was wrongfully appealed to th[at] Court" (Pet'n for Cert., p. 56). It would have been properly so appealed if a constitutional

1. It is assumed that it is apparent that the constitutional questions were properly preserved for review or their presentation waived by having been passed on by the Illinois Supreme Court and that the decision of the Illinois Appellate Court states specifically that that Court lacked authority to pass on the constitutional issues.

question were controlling. Illinois Revised Statutes, Ch. 110, § 75(1). The Illinois Appellate Court to which the appeal was transferred said, in opinion (Pet'n for Cert., p. 33), that it *could not* pass on the constitutional questions, as it believed the Illinois "Supreme Court decided that the issues were not material." (*Ibid.*) Therefore, it would appear that petitioner's complaint is directed to: (1) the erroneous "refusal" of the Illinois Appellate Court to pass on the asserted constitutional questions; and (2) to the finding of the Illinois Supreme Court implicit in its transfer order to the effect that either there was no constitutional question involved or that it was not "material."

Insofar as the decision of the Illinois Appellate Court is concerned, it purports to be based *solely* on non-Federal grounds (Pet'n for Cert., p. 33). However, a summary perusal of the opinion (*Ibid.*, pp. 33-54) discloses that the Court considered and rejected petitioner's contentions that he had been deprived of due process and equal protection.[2] Therefore, despite paying lip-service to abstention, the Appellate Court did pass on the constitutional issues. It did not find any factual controversy as to the relevant evidence. It differed with petitioner only by embracing *an interpretation of the law* which permits such procedure as not offensive to the Constitution. It is submitted that this Court is not bound by such findings. Where the decision of the State court is based solely upon a non-Federal ground, but the federal question was properly asserted, the Supreme Court will determine whether the non-Federal ground independently and adequately supports the judgment. The failure of the State court to pass upon the federal claim is not conclusive. Only if the non-Federal

2. He alleged that the proceedings were based on a defective and void complaint, that the sole evidence against him was procured by entrapment, that admittedly irrelevant and highly prejudicial evidence was received against him and that *unfair* judicial notice was taken.

ground is adequate will review be declined. *Wood* v. *Chesborough*, 228 U. S. 672, 676-680; *West Chicago St. R. Co.* v. *Illinois, ex rel., Chicago*, 201 U. S. 506, 519-520; *Chicago B. & Q. R. Co.* v. *Illinois, ex rel., Com'rs*, 200 U. S. 561, 580-1.

The Illinois Supreme Court transferred petitioner's direct appeal, *without opinion*.[3] Where both federal and non-Federal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment, this Court will ordinarily presume that the decision is based upon a non-Federal ground raised in the record *which may be found adequate to support it*. *Lynch* v. *New York, ex rel., Pierson*, 293 U. S. 52, 54-5; *Adams* v. *Russell*, 229 U. S. 353, 358; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431, and see *Williams* v. *Kaiser*, 323 U. S. 471, 477. But, if this Court is unable to discover an adequate non-Federal ground in support of the state court judgment, "it will be presumed that the state court based its judgment on the law raising the federal question." *Klinger* v. *Missouri*, 13 Wall. 257, 263; see also, *Williams* v. *Kaiser*, *supra*, 478; *Maguire* v. *Taylor*, 8 Wall. 650, 665; *Johnson* v. *Risk*, 137 U. S. 300, 307; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282-3.

---

3. Cf. the opinion of the Illinois Supreme Court in the case of *B. H. Moore, et al.* v. *County Board of School Trustees of Logan County*, 139 N. E. 2d 738, decided Jan. 24, 1957, the published opinion of which has intervened since the denial of certiorari herein, wherein the Court explained why it believed there was no controlling constitutional issue involved and transferred the appeal to the Appellate Court. The Court said (Opin., p. 740): "Unless the constitutional questions presented are debatable, this court does not assume jurisdiction of an appeal on the ground that a constitutional question is involved. [Citing cases.] Inasmuch as the residence and legal voter classifications have long been considered reasonable and proper, particularly in detachment proceedings under school laws, the question may be regarded as settled." Quere: When is a constitutional question debatable?

It is submitted that a microscopic inspection of the record herein fails to disclose an adequate non-Federal ground for the decision. The non-Federal ground that the decision of the Illinois Department of Registration and Education to revoke petitioner's license is not manifestly against the weight of the evidence is not broad enough without reference to the federal question, to sustain the State court judgment. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Eustice* v. *Bolles*, 150 U. S. 361, 370. Even if the evidence against petitioner were sufficient, the improper manner in which it was procured and the effect of the admission of irrelevant and highly prejudicial evidence pose questions which show that the non-Federal ground cannot be independent of the federal question. "Where the non-Federal ground is so interwoven with the other as not to be an independent matter [Supreme Court] Jurisdiction is plain." *Enterprise Irrig. Dist.* v. *Farmer's Mut. Canal Co.*, 243 U. S. 157, 164.

It is therefore patent that the Illinois Courts below have "willy-nilly" passed upon the asserted constitutional question. They decided, in effect, that what petitioner characterizes as unconstitutional deprivations of due process and denials of equal protection are no more than simple evidentiary determinations within the discretion of the trial court.

Where a constitutional issue has been raised and presented to a State court, which was necessary to the judgment or decree rendered in the case and the decision is against the right asserted under the Constitution this Court must examine the judgment to decide whether this claim of right was *correctly* adjudicated by the State court. *Murdock* v. *City of Memphis*, *supra*, p. 636.

It is submitted that the State court decision on the constitutional question was *incorrect*. The line of demarcation

between such judicial or administrative action as amounts to a proper exercise of discretion and such procedural unfairness as constitutes a deprivation of due process is tenuous at best. It has occasioned much difference in thinking and viewpoint.[4] It may be that a single erroneous act by the Board below, in the conduct of its hearing, would not necessarily amount to serious unfairness, but in conjunction with other improprieties, as in this case, it may have the effect of denying a fair hearing.

We believe this Court need not agree with any state court which asserts, on its own authority, that it has accorded any litigant procedural due process; and we think it should refuse to do so in this case. Can it be said that the fairness of a hearing based on an unreal complaint, wherein the only evidence adduced was procured by entrapment and the judgment of the doctors comprising the Medical Committee may have been influenced by admittedly irrelevant and inflammatory evidence, is not "debatable"? We are not referred to any judicial precedent of the Illinois Courts showing that the question is settled, as in *Moore* v. *County Board*, fn 3.

2. The question continues to be one of large practical importance. There is a growing inclination to excuse allegedly unfair judicial action by efforts to justify it in certain cases. These situations will arise increasingly. There is need for some formulation by which a state court or a lower federal court can determine in advance what procedural defects this Court will regard as tantamount to a deprivation of due process, such as will act as a guide for future conduct.[5] In *Breithaupt* v. *Abram*, 77 S. Ct. 408, decided February 25, 1957, this Court said (p. 410):

4. Cf. *Breithaupt* v. *Abram*, 77 S. Ct. 408, decided Feb. 25, 1957, and dissents.

5. We read the case of *Barsky* v. *Board of Regents*, 347 U. S. 442, as holding that although there may be a deprivation of due process attendant upon revocation of a medical license, there *was*

> "* * * due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process."

In the light of this criterion or standard we ask: Would the community as a whole agree that *this* petitioner had received a fair trial?

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Appellate Court of Illinois, First District, the Supreme Court of Illinois or to both such Courts.

Respectfully submitted,

.....

EDWARD BRODKEY,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

EDWARD BRODKEY,
Counsel for Petitioner.

---

none under the facts of that case. As these exact facts may never be repeated, there may never arise any conflict of decision on the point. Cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50.